

Friday, 31 March 2006 at 13.00 – 15.00

From rule-of-no-law to rule-by-justice

Managing partner (Hellevig, Klein, Usov), Jon Hellevig, LL.M

ABSTRACT

My presentation builds on my recent research (approximate date of publication March, 2006) on the emergence of post-Marxist Russian law. I will speak under the heading *From rule-of-no-law to rule-by-justice*. Talking about “*rule-of-law*” in Russia directs most listeners towards an expected outcome – when the heading unexpectedly is followed by “...*to rule-by-justice*” I think that an element of confusion has been introduced. – And this is my aim; I am to show that Russia is on the road to build a system of rule-by-justice, where *justice* is something more demanding and fundamental than *law*.

My research is based on Wittgenstein’s philosophical insight which I resume as “Philosophical problems are caused by posing the wrong questions and the problems disappear with turning the investigation around”. – When we look at Russia we for sure have to turn the investigation around. I approach Russian law through reviewing the prevailing Western philosophical perceptions; I conclude that the first fundamental perception to learn is that law, democracy and economy have to be considered as different aspects of one before we can take any steps on the road of looking at Russian law.

Russia is in a process of fundamentally rebuilding a new kind of society on the ruins of the Marxist system, and the economy, law, and democracy develop hand in hand.

As the Soviet normative system lacked all the essential elements that merit the name ‘law’; I prefer to call it a no-law system. – Certainly Soviet law was a normative system; certainly it was about the competition of normative expressions; this is the very point: the normative competition is ever ongoing; when the normative system has reached a certain balance; when within the system there emerges a level of predictability on how certain types of underlying social relations are to be governed then only the system can possibly be perceived as a system of law. – I would even regard a system of law as the basis, the foundation for a system for producing justice; law precedes justice; justice representing a higher degree of normative development. In a system of justice apart from predictability there has to be strong indications that the life of an individual person is the highest of ideals and that this ideal in reality is defended by the society at large and especially those in power. Eventually in a fully developed competitive democracy and competitive system ‘law’ and justice would be one.

I want to attract attention to some of the fundamental conditions meriting the Soviet system to be characterized as no-law. I refer to these conditions as ‘no-law actual premises’ (i.e. such features that objectively were lacking in the Soviet Union), and ‘no-law formal premises’ (i.e. such policies, and formal circumstances that made up the normative framework, and hence restrained the activity of law).

No-law actual premises:

In the Soviet Union there was:

- No democracy
- No market economy
- No free exchange of goods
- No independent judiciary
- No free individuals
- No legal persons (in reality)
- No private property
- No currency as a measure of value

Without these conditions, there is nothing left that would provide for that kind of normative interaction that could properly be called law

No-Law formal premises:

- The Soviet revolutionary goal was to grab power and keep it by means of exorbitant violence (and this was done)
- The official doctrine of violent revolution and ‘class struggle’
- The law was officially to wither away, and in the transition the regime would use an adapted form of ‘bourgeois law’
- The party leadership and its ideology was placed above the law (being the highest source for rules, interpretation and judgment)
- The laws were merely commands of the regime to its dependents
- These orders were arbitrarily enforced and interpreted
- The courts were mere rubber stamps for party orders

Rule-by-Justice

Once the true nature of law is understood, then one will be ready to replace the archaic and backward looking notion of rule-of-law by the forward looking notion of rule-by-*justice*. It is not enough in a righteous state (or rule-of-law state as it is sometimes called) that there is rule-of-law, but what is needed is a rule of just laws and justice. I call it rule-by-justice. This because no injustice can be motivated by the fact that a ruler or a ruling body has posited something as law, which in fact is the claim of rule-of-law.

I build on Finnis discussion that rule-of-law is really a description of an orderly system, where all the elements interact and therefore actually is the description of an established legal culture. It is also evident that the rule-of-law is not a ‘thing’ that can be implemented by an act of wishing. This is something that the critics of Russian reforms should keep in mind: they look at Russia through distorted perspectives of social life. Finnis gives a fairly adequate characterization of what ‘rule-of-law’ could mean. He calls it ‘a state of affairs in which a legal system is in good shape’. – Being in ‘good shape’ i.e. healthy, is not something one declares to be, but something one can endeavor towards.

In a state like Russia, which started without any real fundamentals for law – actually from a state of deep-rooted institutionalized lawlessness and injustice - it has only been with a lot of courage and vision of the leaders that change has come about. - The balancing act of the Russian leaders is to make rule-by-justice in a state where there does not even exist the conditions for rule-of-law. Finnis describes adequately the task of a leader of a democratic revolution: “Sometimes, moreover, the values to be secured by the genuine Rule of Law and authentic constitutional government are best served by temporarily but perhaps drastically departing, from the law and the constitution. Since such occasions call for that awesome responsibility and most measured practical reasonableness which we call statesmanship, one should say nothing that might appear

to be a key to identifying the occasion or a guide to acting in it...A written constitution is not a suicide pact..."

Rule-by-justice is bringing about the balance that society at any given stage of development is ready for. The political leadership can work only with such building blocks that are of the caliber that the society is ready for. At the same time a good political leadership takes measures to promote the refinement of the building blocks, the arguments, the expressions and their interactions. And this way there will emerge hope for a system that could be called rule-by-justice.

My research shows that the presidents Yeltsin and Putin respectively have been courageous and successful in a gradual creation of the framework for a competitive society, which is the base of democracy and justice.

I show that there are objective problems with the rule-of-law, problems created in the past, and that there are obvious achievements in present day Russia on working on putting in place a rule-by-justice system. The problems will not disappear with wishing them away, but the problems will also not disappear by blaming them on the doctors curing the past illnesses.

Russia is building rule-by-justice by fighting the past heritage of social practices, ranging from the most fundamental social practice – the language to specialized social practices such as the legal practices. And there is clear evidence that the present leadership knows what the problems are and how to tackle them.